

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DAN-ELLEN, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
~~XXXXXX a Refund~~ of Corporation Franchise
Taxes under Article ~~(x) 9-A~~ of the
Tax Law for the ~~XXXXXX Period~~ Fiscal
Years Ended February 28, 1970 through
February 28, 1973.

State of New York
County of Albany

John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of December, 1978, he served the within
Notice of Decision by (certified) mail upon Dan-Ellen, Inc.

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Dan-Ellen, Inc.
152 Madison Avenue
New York, New York 10016

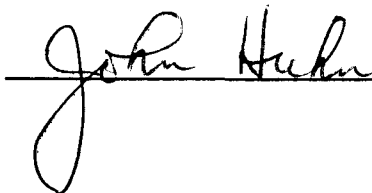
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (~~representative~~
~~of the~~) petitioner herein and that the address set forth on said wrapper is the
last known address of the (~~representative of the~~) petitioner.

Sworn to before me this

13th day of December, 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

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DAN-ELLEN, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
~~xxxxxx of a Refund~~
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Taxes under Article ~~(s)~~ 9-A of the
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Years Ended February 28, 1970 through
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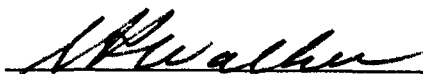
John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of December, 1978, he served the within
Notice of Decision by (certified) mail upon Murray Wiener
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Murray Wiener, CPA
500 Fifth Avenue
New York, New York 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative
of the) petitioner herein and that the address set forth on said wrapper is the
last known address of the (representative of the) petitioner.

Sworn to before me this

13th day of December, 1978.







STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

December 13, 1978

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

**Dan-Ellen, Inc.
152 Madison Avenue
New York, New York 10016**

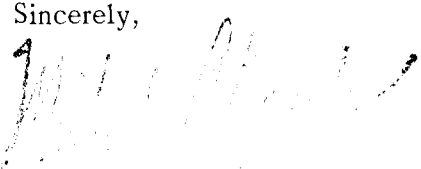
Gentlemen:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section *** 1090** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DAN-ELLEN, INC. : DECISION
for Redetermination of a Deficiency or :
for Refund of Corporation Franchise Tax :
under Article 9-A of the Tax Law for :
the Fiscal Years Ended February 28, 1970 :
through February 28, 1973. :

Petitioner, Dan-Allen, Inc., 152 Madison Avenue, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended February 28, 1970 through February 28, 1973 (File No. 13971).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1976 at 1:15 P.M. Petitioner appeared by Murray Wiener, CPA. The Corporation Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether petitioner had a regular place of business in Pennsylvania and was, therefore, entitled to allocate income outside New York.

FINDINGS OF FACT

1. Petitioner, Dan-Allen, Inc., was incorporated in New York on April 1, 1962. During the years at issue, it had its principal place of business in New York City.

2. Petitioner filed New York State corporation franchise tax reports for the years at issue, on which it claimed the following business allocation percentages:

<u>FISCAL YEAR ENDED</u>	<u>BUSINESS ALLOCATION PERCENTAGE</u>
February 28, 1970	76.7%
February 28, 1971	76.7%
February 29, 1972	65.0%
February 28, 1973	65.0%

3. The Corporation Tax Bureau subsequently issued statements of audit adjustment, disallowing the claims for business allocation percentages on the grounds that petitioner did not have a regular place of business outside New York State. The statements showed the following deficiencies:

<u>STATEMENT</u>	<u>FISCAL YEAR ENDED</u>	<u>DEFICIENCY</u>
May 15, 1973	February 28, 1970	\$1,471.22
May 15, 1973	February 28, 1971	1,584.63
May 15, 1973	February 29, 1972	4,457.24
Sept. 16, 1974	February 28, 1973	4,134.32

4. Petitioner's principal place of business in New York City was a showroom used to solicit and accept customers' orders. The orders were forwarded to Lebanon, Pennsylvania, for processing. Petitioner employed approximately ten persons in New York.

5. Petitioner never had an identifiable physical presence in Pennsylvania. It owned no real property, had no lease, and used no space in Pennsylvania during the period in issue. Petitioner's only employee in Pennsylvania was Seymour Leibowitz, an officer of and

50% stockholder in petitioner. Mr. Leibowitz (a resident of Pennsylvania) was also 50% stockholder of Beth Products, Inc., a New York Corporation with its principal place of business in Pennsylvania.

6. During the period at issue, petitioner performed neither manufacturing, storage, shipping, billing, receiving of payments, bookkeeping, nor any operations at all in Pennsylvania.

7. Petitioner's mailing address in Pennsylvania was that of Beth Products, Inc. Beth Products, Inc. was separate from and independent of petitioner. During the period at issue, the employees of Beth Products, Inc. processed petitioner's mail, kept petitioner's books and conducted petitioner's financial affairs in Pennsylvania, for which services petitioner paid it a service charge.

8. In fact, during the period in issue, all of petitioner's activities in Pennsylvania were conducted by Beth Products, Inc. When orders from petitioner's customers were received by Beth Products, Inc., raw materials were ordered by petitioner from Clock Fashions, Inc., a New York corporation. Clock Fashions, Inc. sent the raw materials to Beth Products, Inc. and billed petitioner for the materials on a monthly basis. Beth Products, Inc. then processed the orders, manufactured the merchandise, shipped the finished products directly to the customers, billed the customers (in petitioner's name) and then billed petitioner for these services.

9. Beth Products, Inc., did not warehouse any merchandise for petitioner. In fact, petitioner did not warehouse any merchandise at all in Pennsylvania.

10. Petitioner paid no taxes in Pennsylvania during the period in issue.

CONCLUSIONS OF LAW

A. That section 210.3 of the Tax Law provides the method for determining the portion of a corporation's entire net income which is to be allocated within New York. However, subsection 210.3(a)(4) reads, in pertinent part:

"...provided, however, that if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred percent;..."

The term "regular place of business" is defined by regulation:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse or other space which is regularly used by the taxpayer in carrying on its business..." (Former ruling of the State Tax Commission dated March 14, 1962, Section 4.11b, now 20 NYCRR 4-2.2(b)).

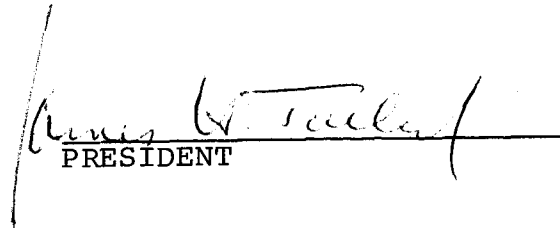
B. That petitioner, Dan-Ellen, Inc., did not have a regular place of business in Pennsylvania, nor anywhere else outside New York State; thus, it has a business allocation percentage of one hundred percent. Accordingly, all of petitioner's entire net income is to be allocated within New York State.

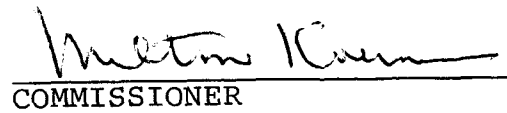
C. That the petition of Dan-Ellen, Inc. is denied.

DATED: Albany, New York

STATE TAX COMMISSION

December 13, 1978


PRESIDENT


COMMISSIONER


COMMISSIONER

Michael Alexander

Paul B. Coburn

Matter of the Petition of Dan-Ellen, Inc.

I spoke to Commissioner Igach about this and his recollection is the same as mine that it was agreed that the requested language should be put on the decision.

You may use this memorandum as authorization to include the following language at the end of the decision:

"This decision expresses the existing audit policy of the Department for taxable periods beginning before January 1, 1978."

Secretary to the State Tax Commission

November 16, 1979

cc---Ray Baker



New York State Department of
TAXATION and FINANCE
TAXPAYER SERVICES DIVISION

To Mr. Coburn Date 11/16/79

Here the copy of
the memorandum concerning

Dan - Ellen, Inc.

Ray Barker
I + I (c)

Commissioner Joseph A.F. Valenti

Technical Services

Paul B. Coburn

March 21, 1979

Implementation of Decisions of State Tax Commission

In accordance with the E-Memorandum No. E-130 dated October 10, 1978, the following State Tax Commission decisions have been reviewed by the Technical Services Bureau.

It is our recommendation that the State Tax Commission revise the following decisions for the reasons stated.

In the Matter of the Petition of Dan-Ellen, Inc.

It is our recommendation that the following language be placed on the decision.

"This decision expresses the existing audit policy of the Department for taxable periods beginning before January 1, 1978."

The reason for this is because chapter 69 of the Laws of 1978 remove the "regular place of business requirement", which allowed a corporation to allocate, for taxable periods beginning on or after January 1, 1978.

In the Matter of the Petition of Sylvan M. Marshall

On page 2, paragraph 2, Findings of Fact reads in part "issued a Notice of Deficiency to petitioner, asserting unincorporated business tax. . .". It appears that the Notice of Deficiency was issued asserting Personal Income Tax not Unincorporated Business Tax. The issue on hand in this decision pertains to Personal Income Tax, not Unincorporated Business Tax.

In the Matter of the Petition of Julius and Angela N. Surkis

On page 5, paragraph A, Conclusion of Law, the last sentence reads in part ". . .intent of section 203(c). . .". It appears that this section should be 703(c).

In the Matter of the Application of FHS Ciger Co., Inc.

Finding of Fact #5 indicates vendor had a sign displayed on the premises which stated "All items sold included sales tax". The sign included only one illustration of the computation of tax, when in fact selling prices varied, and both taxable and nontaxable items were sold. This is not in keeping with the method outlined in ST-155 (6/71) "Record Keeping Instructions for Sales Tax Vendors", Unit Prices for Bars and Grills.

Conclusions of Law A states that the sign displayed by applicant was sufficient evidence to show that sales tax was collected on applicant's sales. This is not compatible with established policy as stated above.

In the Matter of the Application of A.T. Reynolds and Sons, Inc.

Finding of Fact #4 indicates an Exempt Use Certificate was issued to the vendor with the wrong box checked, and a qualifying statement attached.

Conclusions of Law B states the applicant accepted a "properly completed" exempt use certificate when in fact the certificate was improperly completed.

In the Matter of the Application of Sachs New York, Inc.

Finding of Fact #5 is poorly worded. It sounds like the vendor is required to pay New York State more than was collected from a vendor. It would be more accurate to say applicant, Sachs New York, Inc., offered no documentary or other substantial evidence to show that it would be required to pay New York State more than was actually collected from applicant's uncollectible accounts.

In the Matter of the Application of Lafayette Country Club, Inc.

Conclusions of Law A indicates that driving range fees to a member, and fees for guest use of facilities that are billed to a golf or country club member, were dues within the meaning of section 1101(d)(6) prior to its amendment by Chapter 1004, Laws of 1973, effective September 1, 1973.

Conclusions of Law C provides for cancellation of penalties and interest above the minimum statutory rate, but is silent concerning the adjustment to the three periods after September 1, 1973 that are included in the assessment.

Deputy Director

Attachments - 7 decisions
cc--Commissioner Jacobson

Frank J. Puccia
Audrey L. Lobdell
Ron Michalak
Irv Zoots

PBC/par